

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs February 8, 2008

**KENNETH RAY SMITH v. JULIE LINN SMITH**

**Appeal from the Chancery Court for Humphreys County**  
**No. CH-06-002 Robert E. Burch, Chancellor**

---

**No. M2007-00439-COA-R3-CV - Filed: June 4, 2008**

---

In this divorce action, Wife appeals the Trial Court's division of marital assets and allocation of the income tax deduction for the parties' three children to the Husband, the non-custodial parent. Finding no error, we affirm the judgment of the Trial Court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed**

---

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and ANDY D. BENNETT, J., joined.

Jennifer Davis Roberts, Dickson, Tennessee, for the appellant, Julie Linn Smith.

Clifford K. McGown, Jr., Waverly, Tennessee, for the appellee, Kenneth Ray Smith.

**OPINION**

The parties, herein referred to as Husband and Wife, were divorced in the Chancery Court for Humphreys County. Prior to trial, the parties were able to stipulate to some issues, including primary custody and support for their children and division of real and personal property.<sup>1</sup> The case proceeded to a hearing on issues of parenting time; which parent would claim the children as dependents for tax purposes; and whether and how compensatory time, sick leave and annual leave accrued by Husband in the course of his employment would be treated in the division of marital assets.

The Trial Court declined to divide Husband's accrued annual leave, sick time and compensatory time. In his ruling the Chancellor found that there was "no way to calculate sick,

---

<sup>1</sup> There was some disagreement as to the valuation of certain personal property and payments on marital debt made after the separation of the parties but those issues are not raised in this appeal.

annual and comp and adjustment at retirement and so forth,” that “[a]s far as sick, annual and comp days in increasing his income, there is just no way to figure that” and that there was “no way to say what these sick, annual and comp days are worth.” The Court adopted the parties’ agreement that Wife would be the primary residential parent and set visitation for Husband. With reference to the allocation of the tax deductions to Husband, the Chancellor found that “[h]e makes significantly more and would benefit from it more.”

Wife asserts that the Trial Court’s division of marital property was inequitable. Specifically, she contends that the value of Husband’s accumulated annual leave, sick time and compensatory time, which she values at \$95,637.50, constitutes marital property in accordance with the definition of marital property at Tenn. Code Ann. § 36-4-121(b)(1)(B) and should have been treated as such by the Trial Court. The failure to include these elements as part of the marital estate, Wife contends, results in the Trial Court’s award of only 28% of the marital estate to Wife. Wife also contends that the Court’s award to Husband of the income tax deduction for the children was an abuse of discretion and unsupported by the proof.

### Analysis

We review the trial court’s conclusions on issues of law *de novo*, with no presumption of correctness. See *Davis v. Davis*, 138 S.W.3d 886, 888 (Tenn. Ct. App. 2003); *Kendrick v. Shoemaker*, 90 S.W.3d 566, 569 (Tenn.2002). Findings of fact are reviewed *de novo*, presuming that the trial court’s factual determinations are correct, unless the preponderance of evidence is otherwise. See Tenn. R.App. P. 13(d); *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 296 (Tenn.Ct.App.2001). Trial courts are given wide latitude in equitably dividing marital property and the appellate court will defer to trial judge’s decision unless the decision is inconsistent with the factors set forth in Tenn. Code Ann. § 36-4-121(c) or is not supported by a preponderance of the evidence. See *Schuett v. Schuett*, No. W2003-00337-COA-R3-CV, 2004 WL 689917, at\*1 (Tenn. Ct. App. March 13, 2004) *perm. app. den.* (Tenn. Nov. 15, 2004).

A three-step process is utilized in equitably dividing property claims: first, all assets of the parties are identified; second, the assets are classified as separate or marital; third, the marital assets are equitably divided. See 19 W. Walton Garrett, *Tennessee Practice: Tennessee Divorce, Alimony and Child Custody* § 15.2, at 355 (2<sup>nd</sup> rev. ed. 2007) (Tennessee Divorce). Questions regarding the classification of property as marital or separate are factual. See *Owens v. Owens*, 241 S.W.3d 478 (Tenn. Ct. App. 2007), *perm. app. denied* (Tenn. Sept. 17, 2007); Tennessee Divorce § 15.3, at 358.

#### *Annual and Sick Leave and Compensatory Time*

The initial question we must resolve is whether the Husband’s accumulated annual and sick leave and compensatory time constitute marital property subject to division. Tenn. Code Ann. § 36-4-121(b)(1)(B) defines “marital property” to include “the value of . . . other fringe benefit rights relating to employment that accrued during the period of the marriage.” Inherent in the statutory provisions for distributing marital property is the requirement that the property be capable of

valuation,<sup>2</sup> division, distribution or assignment. *See* Tenn. Code Ann. § 36-4-121(a)(1) & (2). Thus, a benefit which has value and which has accumulated during the course of the marriage is, pursuant to the language of the statute, marital property; conversely, a benefit which has no value is not marital property.

At the time of trial, Husband had accumulated 411.3 hours of annual time, 3,539.3 hours of sick time and 304.4 hours of compensatory time.<sup>3</sup> The proof offered relating to value of the accumulated sick and annual leave and compensatory time was the testimony of Husband, who testified that sick leave is accumulated at 7.5 hours per month; annual leave is accumulated at 13.4 hours per month and is converted to sick leave when it reaches 400 hours; and that compensatory time allows him to take time off (up to the number of hours accumulated) when work is slow. Compensatory time has no monetary value and is lost if not used. Annual leave is lost if not used during the period of employment. Only accumulated sick leave has any purpose if not taken, when it can be counted toward years of service for retirement purposes. In all instances, the benefit is paid time away from the job; the time has no impact on salary and is not determined by the amount of salary received.

Wife's valuation of the accumulated leave time was reached by multiplying the accumulated hours times an hourly rate that was determined based on a letter from the Governor to Husband which put the monetary value at \$22.00 per hour, to which she added \$.50 "for any raises he might have gotten." The letter upon which Wife relied was not shown to the Trial Court or made a part of the record and there was no other testimony of any monetary value attendant to the accumulated hours.

Black's Law Dictionary defines "value" to mean: "[T]he estimated or appraised worth of any object or property, calculated in money." BLACK'S LAW DICTIONARY 1551 (6th ed. 1990).<sup>4</sup> From the testimony, it is clear that, while the accumulated hours are benefits of Husband's employment which accrued during the period of the marriage, they are not benefits that have monetary value or worth, cannot be converted into cash and are not capable of being used to increase the worth or value

---

<sup>2</sup> Tenn. Code Ann. § 36-4-121(b)(1)(A) requires all marital property "to be valued as of a date as near as possible to the date of entry of the order finally dividing the marital property."

<sup>3</sup> Wife claimed that Husband retained 411.3 hours of sick time and 3,539.3 hours of annual time. Husband testified that these figures were reversed. The trial court did not delineate the hours and such delineation is not necessary for the resolution of this appeal.

<sup>4</sup> Black's states further: "In economic consideration, the word 'value,' when used in reference to property, has a variety of significations, according to the connection in which the word is employed. It may mean the cost of a production or reproduction of the property in question, when it is sometimes called 'sound value;' or it may mean the purchasing power of the property, or the amount of money which the property will command in exchange, if sold, this being called its 'market value,' which in the case of any particular property may be more or less than either the cost of its production or its value measured by its utility to the present or some other owner; or the word may mean the subjective value of property, having in view its profitableness for some particular purpose, sometimes termed its 'value for use.'" BLACK'S LAW DICTIONARY 1551 (6th ed. 1990).

of any other benefit that does have identifiable monetary value (e.g., salary, pension rights, stock option rights, retirement benefits, etc.); the accumulated time off is wholly intangible. As noted by the Trial Court, there is no way to place a monetary value, present or future, on the benefits. While wife is correct in asserting that the law of this state recognizes the present value method and the retained jurisdiction method as ways to value and distribute pension benefits *see Poyner v. Poyner*, No. 01-A-01-9503-CH-00116, 1995 WL 656879, at \*5 (Tenn. Ct. App. Nov. 9, 1995) (*perm. app. denied* (Tenn. March 25, 1996); *Kendrick v. Kendrick*, No. 01-A-01-9305-CH-00207, 1994 WL 642775, at \*5 (Tenn. Ct. App. Nov. 16, 1994), those methods are of no use where there is no cash value to the benefit.

In the absence of any explanatory testimony relative to the letter, Wife's testimony that the accumulated hours had a monetary value was entirely speculative and the Trial Court did not err in holding that her testimony was insufficient to establish a monetary value for the accumulated time.<sup>5</sup> Moreover, there was no proof that Husband was entitled to the \$95,637.50 in cash or its equivalent relative to another monetary benefit. It was incumbent upon Wife to bring forth competent evidence to establish any actual value of the accumulated time. *See Kinard v. Kinard*, 986 S.W.2d 220 (Tenn. Ct. App. 1998). The record does not weigh against the Court's conclusion that the accumulated hours were not marital assets and the Trial Court did not err in disregarding Husband's accumulated annual and sick leave and compensatory time off in its determination of marital property.<sup>6</sup>

#### *Tax Deductions*

Wife, the primary residential parent designated in the Parenting Plan ordered by the Court, assigns as error the Trial Court's allocation of the tax deductions for the three children of the parties to Husband. In making the award, the Trial Court stated: "Tax deduction is awarded to Mr. Smith. He makes significantly more and would benefit from it more."

The allocation of tax exemptions for children of divorcing parents is a matter of discretion with the trial court and the court's order in that regard is reviewed on appeal for an abuse of such discretion. *See Miller v. Miller*, No. 02A01-9809-CH-00271, 1999 WL 329777, at \*2 (Tenn. Ct. App. May 21, 1999); *Barabas v. Rogers*, 868 S.W.2d 283 (Tenn. Ct. App. 1993). A court abuses its discretion if there is insufficient evidence in support of its judgment. *See Travis v. Travis*, No. E2000-01043-COA-R3-CV, 2001 WL 261543, at \*5 (Tenn. Ct. App. Mar. 16, 2001). The trial court's factual findings are considered *de novo*, accompanied by a presumption of correctness unless the preponderance of the evidence is to the contrary. *See Tenn. R. App. P. 13(d)*. When reviewing a trial court's discretionary decision, the appellate court begins with the presumption that the decision is correct and reviews the evidence in the light most favorable to the decision. *See Overstreet v. Shoney's Inc.*, 4 S.W.3d 694 (Tenn. Ct. App. 1999). The trial court's decision will be

---

<sup>5</sup> *See Brandon v. Brandon*, No. 01-A-01-9805-CV-0023, 1999 WL 248652 at\*5 (Tenn. Ct. App. April 29, 1999) (holding that unvested stock options were too contingent and speculative to be considered marital property).

<sup>6</sup> Excluding Wife's valuation of the accumulated time from the calculation of marital assets results in Wife receiving slightly more than half of the net marital estate.

set aside only when it is based on a misapplication of controlling legal principles or a clearly erroneous assessment of the evidence. *See id.*

The record supports the Trial Court's conclusion that Husband made more than Wife. The parties stipulated that Husband's 2006 gross income (through the date of trial of December 21, 2006) was \$46,712.10 and Wife's income for the same period was \$41,960.57. Although not a factual finding of the Trial Court, this Court notes that, in addition to monthly child support payments, Father was ordered to maintain health insurance on the children, as well as dental, orthodontic and optical insurance, if same was available through his work. In light of the foregoing, we cannot say that the Trial Court abused its discretion in awarding the tax dependency exemptions to Father.

### **Conclusion**

For the reasons set forth above, we affirm the judgment of the Chancery Court. Costs are assessed against Appellant.

---

RICHARD H. DINKINS, JUDGE